

# **REMARKS/ARGUMENTS**

Re-examination and favorable reconsideration in light of the following comments are respectfully requested.

Claims 37 - 82 are pending in the application. Currently, all claims stand rejected.

By the present amendment, claims 37, 49, 55, 72, and 78 have been amended.

In the office action mailed December 23, 2008, the Examiner provisionally rejected claims 37 - 45, 48, 52, 58, 59, and 66 - 81 on the ground of non-statutory obviousness type double patenting over claims 32 - 39, 53, 56 - 69, and 72 - 73 of co-pending application no. 10/542,935; claims 37 - 79 were rejected under 35 U.S.C. 112, second paragraph as being indefinite; claims 37 - 63, 65 - 71, 76, and 80 - 82 were rejected under 35 U.S.C. 103(a) as being unpatentable over WO 2001/068355 to Dambricourt in view of U.S. Patent No. 5,314,746 to Johnson et al.; claims 64, 77, and 79 were rejected under 35 U.S.C. 103(a) as being unpatentable over Dambricourt in view of Johnson et al. and further in view of U.S. Patent No. 5,372,863 to Nishikawa; and claims 73 - 75 were rejected under 35 U.S.C. 103(a) as being unpatentable over Dambricourt in view of Johnson et al. and further in view of WO 2001/094213 to Doherty et al.

The foregoing rejections are traversed by the instant response.

With regard to the provisional obviousness type double patenting rejection, Applicant disagrees with the Examiner's analysis for the reasons of record. However, this rejection is now moot in view of the attached terminal disclaimer.

With respect to the rejection on indefiniteness grounds, claims 37, 49, 55, 72, and 78 have been amended in accordance with the suggestions contained in the advisory action. Applicant submits that the indefiniteness rejection is now moot in view of the above amendments.

With respect to the rejection of claims 37 - 63, 65 - 71, 76, and 80 - 81 over the combination of Dambricourt in view of Johnson et al., it is respectfully submitted that the combination of references does not render the claimed invention obvious.

Dambricourt discloses a flexible tube comprising a wall made of  $C_4 - C_{10}$  linear ethylene-olefin copolymer or a mixture of  $C_4 - C_{10}$  linear olefin copolymers. The tube of Dambricourt is resistant to stress-cracking and impermeable to water vapor. The polymer mixture, which forms the wall of this tube, does not comprise any polypropylene.

Johnson et al. notably describes films produced by copolymers of propylene and with from 3 to 47 weight percent ethylene. According to the specification of this document on column 8, lines 16 to 20, the flexural modulus of said copolymers can range from 20,000 psi to 100,000 psi and, preferably from 40,000 psi, i.e. between 137.8 MPa and 689.7 Mpa, and preferably between 275.9 MPa and 482.8 MPa. However, Johnson et al. remains silent about the conditions of dispersion of the flexural resin composition (in other words, the dispersion factor Kd) and the water-barrier properties of the films.

As discussed in Applicant's prior response, it is far from obvious that one of ordinary skill in the art would have combined the teachings of Dambricourt with the teachings of Johnson et al. to arrive at the tube of the

present invention. There is no incentive for one of ordinary skill in the art to use one of the polypropylenes of the compositions of Johnson et al. in the polymer mixture of Dambricourt, since polypropylenes typically present a low water-barrier, generally lower than that of polyethylenes (see paragraph [0025] of the substitute specification). Furthermore, the high rigidity of polypropylene (in general much higher than that of polyethylene) should, in principle, limit its use for the fabrication of flexible tubes (see paragraph [0023] of the substitute specification).

Indeed, there is absolutely no incentive in the references for one of ordinary skill in the art to imagine an equation for perfecting the conditions of dispersion of the flexural modulus values of the constituents of a resin composition (in other words, the dispersion factor  $K_d$ ) which leads to a compromise to be made between the need to impart flexibility to the tube (see the substitute specification on page 17, paragraph [0102]) and the need to reduce weight loss. Contrary to the opinion of the Examiner, the equation presented in claim 37 is a constraint and not a result as shown by the examples in the specification in the instant application. The examples clearly show that the equation gives the rule for mixing the components of the mixture in order to form a flexible tube made of polypropylene having a strong water barrier. It is submitted that this makes the claimed invention non-obvious over the cited and applied references. It is thus requested that the rejection be withdrawn.

With regard to the Examiner's comments in the advisory action, said comments show the hindsight nature of the

rejection. The issue is not whether one of ordinary skill in the art could create the invention. The issue is whether the cited and applied prior art renders obvious the claimed invention. The answer to that issue, for the reasons stated above, is "no". The prior art says absolutely nothing about the claimed dispersion factor. The Examiner's position is erroneous because the Examiner fails to recognize that there is nothing in the prior art which discusses the significance of the dispersion factor. Given this fact, there is no reason why one of skill in the art would want to optimize this factor. The only reason the Examiner knows that this factor is significant is because the Examiner has the benefit of Applicant's disclosure before him. One of ordinary skill in the art having the cited and applied references before him/her does not have this benefit.

With regard to the Examiner's comments about the claimed equation, the Examiner places the cart before the horse. The issue is whether the claimed dispersion factor (the equation) would be obvious to one of ordinary skill in the art. What needs to be obvious is the claimed subject matter, not a tube that may or may not fit the equation. The Examiner has not shown that the equation is rendered obvious by the prior art.

Claims 38 - 63, 65 - 71, 76, and 80 - 81 are allowable for the same reasons as claim 37 as well as on their own accord.

With regards to the other obviousness rejections in the application, the tertiary references to Nishikawa and Doherty do not cure the aforementioned deficiencies of Dambricourt and Johnson et al. With regard to Nishikawa,

it should be noted that it discloses a laminate tube having a shoulder with improved barrier properties, characterized in that the shoulder comprises a material composed of: (A) 0 to 50 wt% of polyethylene; (B) 10 to 50 wt% of an ethylene-vinyl alcohol copolymer or a saponified ethylene-vinyl acetate copolymer, and (C) 10 to 90 wt% of a carboxylic acid-modified adhesive polyethylene resin. The material of the shoulder does not comprise polypropylene.

Claims 64, 73 - 75, 77, and 79 are allowable for the same reasons as their parent claims as well as on their own accord.

For these reasons, the instant application is believed to be in condition for allowance. Such allowance is respectfully solicited.

Should the Examiner believe an additional amendment is needed to place the case in condition for allowance, he is hereby invited to contact Applicant's attorney at the telephone number listed below.

The Director is hereby authorized to charge the terminal disclaimer fee in the amount of \$140.00 to Deposit Account No. 02-0184.

If the Director determines that an additional fee is due, he is hereby authorized to charge said fee to said Deposit Account No. 02-0184.

Respectfully submitted,  
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